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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	Gen Docket No. 90-314
	)	
Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

EX PARTE COMMENTS OF
PCS LICENSING EQUITY ALLIANCE

The PCS Licensing Equity Alliance, by its undersigned attorneys, submits these ex parte comments in the above captioned proceedings pursuant to Section 1.1206(a)(2) of the Commission's Rules. An original and one copy has been submitted to the Secretary.

I. Introduction

There has been significant discussion at the Commission and throughout the industry whether bidding credits for small businesses, businesses owned by minorities and women and rural telephone companies (the "designated entities") stand on firmer constitutional grounds than set-asides. In September, 1993, the Commission adopted a broadband PCS allocation plan which specifically contemplated the use of two set-asides for designated entities, namely, Blocks C and D. Second Report and Order, Gen. Docket No. 90-314 at ¶ 60, n. 61. (adopted September 23, 1993). It has been reported widely that the Commission is reconsidering this critically important determination apparently,

in large part, because of the view that bidding credits may be less vulnerable to constitutional attack than set-asides.

The PCS Licensing Equity Alliance ("PLEA") respectfully submits that a bidding credit is not more likely to survive a constitutional challenge than a set-aside. That being the case, there are compelling reasons to adopt a set-aside which the overwhelming weight of evidence in the record indicates will be an effective remedy.

Specifically, PLEA contends that the same constitutional standard, whether rational basis, intermediate or strict scrutiny, will be used to evaluate the Commission's use of either bidding credits or set-asides to enable designated entities to participate in broadband PCS. Bidding credits are not likely to be analyzed under a lesser constitutional standard. If the courts apply a rational basis or intermediate scrutiny test, both preferences almost certainly will pass constitutional muster. If the courts apply strict scrutiny, the likelihood that set-asides will pass constitutional muster is at least equal, if not superior, to the likelihood that bidding credits will be constitutional because set-asides, rather than bidding credits, are more narrowly tailored to remedy the problems addressed by the 1993 Omnibus Budget Reconciliation Act, i.e., gross underrepresentation of small businesses, woman-owned businesses, minority-owned businesses and rural telephone companies in the ownership of telecommunications facilities and excessive concentration in the telecommunication industry.

II. The Same Constitutional Standard Should Be Applied to Both Bidding Credits and Set-Asides

The designated entity classification, rather than one based solely on race or gender, is a broad classification based on an economic rationale -- the need for providing designated entities economic opportunity to compete in offering spectrum-based services and to avoid a concentration of ownership in the telecommunications industry. Since there is a rational basis for the Commission to adopt set-asides to achieve Congress' objective of providing economic opportunity for designated entities and given Congress' broad powers to legislate in areas of social and economic policy, a designated entity set-aside is constitutionally permissible. See, F.C.C. v. Beach Communications, Inc., 113 S.Ct. 2096, 2101 (1993) (the court held that a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld if there is a rational basis for the classification).

If the presence of race and gender sub-classifications in the designated entity classification severs these groups from the others for constitutional purposes or requires that the entire classification be considered as one based on race or gender, then, independent of whether the Commission adopts bidding credits or set-asides, courts will apply the same standard of review to determine the constitutionality of either preference depending upon the classification being evaluated. See,

Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3rd. Cir. 1993).

In Contractors Association, the court evaluated the City's minority-, gender- and handicap-based preferences under different constitutional standards. In light of Contractors Association, a rational basis test will be used if the small business and rural telephone classification is evaluated independently of the race and gender classifications because the classification is neither suspect not infringes fundamental constitutional rights. Id. at 1011. The small business and rural telephone classifications exist solely to ensure that these entities participate in broadband PCS and provide competition in the delivery of such services. This economic rationale provides a rational basis for the small business and rural telephone classification to be upheld.

A. Under the Fullilove Test, Both Set-Asides and Bidding Credits Should Pass Constitutional Muster

For the race- and gender-based preference, a higher level of scrutiny will be used. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." Fullilove v. Klutznick, 100 S.Ct. 2758, 2781 (1980). See also, Mississippi University for Women v. Hogan, 102 S.Ct. 3331 (1982).

The constitutional standard applied for gender and raced based classifications depends on what type of governmental body adopts the preference and the underlying nature of the classification. Although the appropriate test for a non-federal racial classification is whether the classification is narrowly tailored to achieve a compelling governmental interest, race-conscious classifications adopted by Congress to address racial discrimination are subject to a lesser standard. Richmond v. J.A. Croson Co., 109 S.Ct. 706, 721 (1989) ("Congress may identify and redress the effects of society-wide discrimination" Id. 109 S.Ct. at 720); Metro Broadcasting, Inc. v F.C.C., 110 S.Ct. 2997 (1990) ("race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." Id. 110 S.Ct. at 3009). This lesser standard is the same standard used to evaluate gender classifications; that is, whether the classification is substantially related to furthering an important governmental objective. Craig v. Boren, 97 S.Ct. 451, 457 (1976). These distinctions have been upheld in numerous recent cases.[1/]

1/ See, e.g., Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir.), cert. denied 500 U.S. 454 (1991) (the court found that, absent a showing of discrimination, the state set-aside program was not narrowly tailored and thus violated equal protection guarantees, whereas any federally funded set-aside program implemented by the state was subject to intermediate scrutiny and the findings of discrimination were not required); Michigan Road Builders Association v. Blanchard, 761 F. Supp. 1303 (W.D. Mich. 1991), aff'd 979 F.2d 851 (6th Cir. 1992), cert. denied, 113 S.Ct. 1847 (1993) (the court affirmed that state recipients of federal funds fall under the federal statute and are not required to make additional findings of discrimination to justify the set-aside); Contractors Ass'n v.

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While Congress has directed the Commission to promote economic opportunity and competition by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of designated entities, it has left to the Commission's discretion the manner in which this should be accomplished. Although set-asides are not mandated by the 1993 Budget Act to accomplish these objectives, the Commission acting under the authority of federal statute has the authority to adopt regulations which are reasonably related to the purposes of the enabling legislation. Mourning v. Family Publication Service, Inc., 93 S.Ct. 1652 (1973). As long as the regulations fall within the authority conferred by Congress on the Commission, such grant of authority need not be specific. Chrysler Corp. v. Brown, 99 S.Ct. 1705, 1720 (1979). "What is important is that . . . the grant of authority contemplates the regulations issued." Id. Specifically, the Commission's regulations must give effect to Congress' commitment to a particular concern. Younger v. Turnage, 677 F. Supp. 16, 22 (D.D.C. 1988).

Congress has repeatedly shown its commitment to providing economic opportunity to designated entities. Indeed, once Congress has legislated repeatedly in an area of national concern, such as providing economic opportunity for entities that historically have had difficulty securing adequate funding to participate in an industry, its Members gain experience that may

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City of Philadelphia, 6 F.3d 990, 1009-10 (3rd Cir. 1993) (the court used intermediate scrutiny to evaluate the city's gender-based preferences).

participate in an industry, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area. Metro Broadcasting Inc., 110 S.Ct. at 3013 (1990) citing Fullilove, 100 S.Ct. at 2787 (Powell, J., concurring). In Fullilove, although the Act containing a 10 percent minority set-aside recited no findings justifying the set-aside, the Court was satisfied that Congress had abundant historical basis from which it could conclude that such a measure was necessary. Fullilove, 100 S.Ct. at 2774-75. Thus, under the rationale of Metro Broadcasting and Fullilove, the FCC may use Congress' previous hearings and findings on the issue of underrepresentation in minority and women ownership of telecommunications facilities to support, in a constitutionally sustainable manner, the preferences it adopts to implement congressional policy.

The constitutionality of the Commission establishing a spectrum set-aside is supported by relevant legislative findings which accompanied previous congressional enactments bearing on discrimination and insufficient economic opportunity for minorities and women in the field of communications and in other areas of national economic concern. To that end, Congress and the House Energy and Commerce Committee have a long history of promoting, as an important governmental interest within its power, economic opportunity among small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Indeed, Congress, the Federal Communications Commission and the courts have compiled a comprehensive record

over more than a decade documenting the lack of opportunity and the resulting underrepresentation of such entities in the communications industry.

For example, in the Conference Report accompanying the Communications Amendments Act of 1982, the conferees stated that diversifying the media of mass communications was important because it promoted "ownership by racial and ethnic minorities -- groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities . . . ." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43. [Emphasis added.] The conferees continued:

> the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has severely affected their participation in other sectors of the economy as well. We note that . . . of 8,748 commercial broadcast stations in existence in December 1981, only 164, or less than two percent, were minority owned. Similarly, only 32 of the 1,386 noncommercial stations, slightly over two percent were minority owned.

Id. at 43-44.

When the Cable Communications Policy Act of 1984 was enacted, Congress was convinced that a strong equal employment opportunity policy would result in significant numbers of minorities and women taking advantage of existing and future cable system ownership opportunities. This was especially crucial because "women and minorities are still significantly underrepresented as employees and owners in the [cable] industry." H. Rpt. No. 98-934, 98th Cong., 2d Sess. 86.

In 1992, the Energy and Commerce Committee restated its 1984 findings that women and minorities still were underrepresented significantly as employees and owners in the cable industry. As a result, the Committee bolstered its EEO policy to increase the ownership interests of women and minorities in the cable industry in the Cable Television Consumer Protection and Competition Act of 1992. H. Rpt. No. 102-628, 102d Cong., 2d Sess. 111.

Similarly, during debate on a Department of Defense minority-owned business preference program, Members of Congress cited the disparity between the percentage of defense contracts going to minority businesses in 1985 (2.2 percent) and the percentage of military personnel from minority groups at the same time (26.7 percent) as evidence that a preference was needed. 131 Cong. Rec. H. 4981, 4982-83 (daily ed. June 26, 1985) (statements of Reps. Savage and Conyers). In debate on a Department of Transportation minority-owned business preference program enacted in 1982, the sponsoring legislator argued for the acceptance of his program on the basis that minorities at that time were experiencing unemployment greater than the national average (20 percent black unemployment versus the national average of 10.8 percent). 128 Cong. Rec. H 8954 (daily ed. Dec. 6, 1982) (Statement of Rep. Mitchell). In each of these cases, Congress has examined the lack of economic opportunities for minority-owned enterprises and, in the course thereof, has developed an institutional expertise on the issue of underrepresentation of such entities in key industry segments, including telecommunications.

Moreover, the Commission's Small Business Advisory Committee recently has found that entry opportunities for small service providers have been constrained in existing telecommunications markets by undercapitalization and concentration of ownership which exclude businesses owned by minorities and women. Capital formation continues to be the major economic barrier to full participation by small and minority owned businesses. This is especially true with respect to new communications industries. Report of the FCC Small Business Advisory Committee to the FCC, Gen. Docket No. 90-314, September 15, 1993.

In light of this extensive record, it is well established that the Commission has the authority to adopt preferences for the purpose of promoting economic opportunity for small businesses, rural telephone companies and minority and women owned businesses that are seeking to provide telecommunications services.

B. Bidding Credits and Set-Asides Both Pass Intermediate Level Scrutiny

In Fullilove, the Chief Justice (joined by Justices White and Stevens) examined the federal minority business enterprise ("MBE") set-aside in the Public Works Employment Act of 1977. The Court was satisfied that (1) the set-aside was within the power of Congress and (2) the limited use of racial criteria was a permissible means for achieving the congressional objectives. Fullilove, 100 S.Ct. at 2772. In his concurrence, Justice Marshall (joined by Justices Brennan and Blackmun) concluded that

the racial classification used in the set-aside (1) served important governmental objectives and (2) was substantially related to the achievement of those objectives. Fullilove, 100 S.Ct. at 2796 (Marshall, J., concurring). The Court in Metro Broadcasting reaffirmed the latter standard in upholding the FCC's preferences for minority owned broadcast entities. Metro Broadcasting, 110 S.Ct. at 3009. Fullilove and its progeny have not been overruled. Indeed, its analysis has been reaffirmed repeatedly. The Fullilove standard should be controlling in evaluating the Commission's use of either bidding credits or set-asides for designated entities. See, Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir.), cert. denied 500 U.S. 454 (1991); Michigan Road Builders Association v. Blanchard, 761 F. Supp. 1303 (W.D. Mich. 1991), aff'd 979 F.2d 851 (6th Cir. 1992), cert. denied, 113 S.Ct. 1847 (1993).

Under the first prong of both tests enunciated in Fullilove, the objectives of Section 309(j)(3)(B) of the Communications Act of promoting economic opportunity for designated entities and disseminating licenses among a wide variety of applicants to avoid excessive concentration of ownership in the telecommunications industry must be within the power of Congress or serve an important governmental objective.

The use of bidding credits or set-asides are within the scope of Congress' Commerce and Spending Powers. U.S. Const. Art. I. § 8, cl. 3, 1. Congress has plenary authority to regulate interstate telecommunications. See, F.C.C. v. League of

Women Voters of California, 104 S.Ct. 3106 (1984); California Bankers Association v. Shultz, 94 S.Ct. 1494, 1510 (1974); Katzenback v. McClung, 85 S.Ct. 377 (1964). The Commission's use of bidding credits or set-asides in exercising its competitive bidding authority necessarily implicates Congress' Spending Power. Congress frequently has employed its Spending Power to further broad policy objectives such as remedying effects of past racial and ethnic discrimination. Lau v. Nichols, 94 S.Ct. 786 (1974). Moreover, the reach of Congress's Spending Power is at least as broad as its regulatory powers. Fullilove, 100 S.Ct. at 2773. Thus, the use of bidding credits and set-asides are within the power of Congress.

The Supreme Court has determined that creating economic opportunities for minority businesses and women who have historically been discriminated against also is an important governmental purpose and within the power of Congress. Fullilove 100 S.Ct. 2758 (1980). See also, Califano v. Webster, 97 S.Ct. 1192 (1977) (the Court held that reducing the disparity in economic condition between men and women caused by the long history of discrimination against women is an important governmental objective); Adarand Constructors v. Pena, 16 F.3d 1537 (10th Cir. 1994) (the court held the Department of Transportation's provision of subcontracting opportunities for small disadvantaged businesses was an important governmental objective); Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, 112 S.Ct. 875 (1992), reh'g denied 112 S.Ct. 1307 (1992) (the Court upheld King County's use of a

woman-owned business set-aside to remedy the many disadvantages that confront women business-owners). Thus, under the first prong, promoting economic opportunity among designated entities is an important governmental objective.

Under the second prong of both tests enunciated in Fullilove, the preference must be a permissible means for achieving Congress' objective, that is, substantially related to the important governmental objective of promoting economic opportunity for designated entities and disseminating licenses to a wide variety of applicants. Substantially related requires that the nexus between the preference and the important government objective be sufficiently strong and within the considered judgment of Congress and the Commission. Metro Broadcasting, 110 S.Ct. at 3019. Moreover, Congress reasonably has determined that race-conscious means are necessary to break down the barrier confronting participation by designated entities in broadband PCS. Fullilove, 100 S.Ct. at 1796 (Marshall, J., concurring).

Without set-asides or bidding credits, businesses owned by minorities, women, small businesses and rural telephone companies will have to battle entrenched, well-heeled, communications providers just to obtain a PCS license -- a battle they are virtually certain to lose absent these preferences, given the considerable amount of capital necessary to obtain a PCS license and to build out a PCS system. Because bidding credits and set-asides are free from constitutional defects on their face and are

substantially related to achieving an important governmental objective, they must be upheld as within Congress' power. See, Parker v. Levy, 94 S.Ct. 2547, 2563 (1974).

C. If a Strict Scrutiny Test is Applied, Set-Asides Should Not Be More Vulnerable to Constitutional Challenge Than Bidding Credits

In light of the recent changes in the composition of the Supreme Court, it is conceivable, though speculative, that a new majority of the Court might emerge which would reverse the holdings of Fullilove and Metro Broadcasting and require that strict scrutiny should be applied to any program involving a suspect classification, notwithstanding that the preferences emanate from a Congressional directive. Under strict scrutiny, racial classifications are permissible if they are necessary and narrowly tailored to achieve a compelling governmental interest. Metro Broadcasting, 110 S.Ct. at 3029 (O'Connor, J., dissenting).[2/]

2/ The statement in Metro Broadcasting that "the Commission studied but refused to implement the more expansive alternative of setting aside certain frequencies for minority broadcasters" is dictum and is not controlling in this instance. Metro Broadcasting, 110 S.Ct. at 3023. The Court in that case was concerned about how tight a nexus there was between a broadcaster's race and the station's resulting programming. That is, would minority broadcasters' programming actually be diverse as a result of their minority ownership. The dissenting justices went to great lengths to say that this nexus was "considerably less than substantial" and that the majority had relied on impermissible generalizations to prove that minority broadcasters, as opposed to non-minority broadcasters, would further broadcast diversity. Metro Broadcasting, Id. at 3041 (O'Connor, J., dissenting).

The nexus in the instant case, unlike in Metro Broadcasting, is very tight. There is no dispute that set-asides will guarantee that designated entities become broadband PCS

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The Supreme Court has found remedying the effects of racial discrimination to be a compelling governmental interest. Id., at 3034 (O'Connor, J., dissenting). In this regard, as discussed earlier, once Congress has legislated repeatedly in an area of national concern its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area. Further, as long as the Commission's rules are consistent with congressional purpose as expressed in its authorizing statute, the Commission may use Congress' previous hearings and findings on the issue of underrepresentation in minority and women ownership of telecommunications facilities due to past discrimination to support the preferences it adopts to implement congressional policy.

The second prong of the strict scrutiny test examines whether the preferences are narrowly tailored to achieve the compelling governmental interest. Narrowly tailored does not imply that the preference is weaker or somehow less intrusive. Narrowly tailored means that the remedy adopted must effectuate the governmental interest at hand, in particular to remedy the effects of past discrimination. Croson, 98 S.Ct. at 729. For this reason, set-asides, as opposed to bidding credits, are on at least as strong, if not firmer, constitutional ground.

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licensees. There is some doubt as to how successful bidding credits will be in ensuring designated entities will become PCS licensees. Thus, reliance on the statement in Metro Broadcasting is misplaced and should not be controlling in this inquiry.

Set-asides ensure that Congress' objectives are achieved. Set-asides guarantee that designated entities, be they minority or women owned businesses, small non-minority businesses or rural telephone companies will become PCS licensees. Further, Congress' objective of disseminating licenses to a wide variety of applicants will be fulfilled.

Bidding credits, on the other hand, are not necessarily the best means to achieve Congress' objectives for three reasons. First, bidding credits are wholly speculative. They encourage passive investments with an aim toward selling the license at a later date. Bidding credits do not ensure that designated entities will become owners and operators of PCS systems and share in the economic development which Congress sought to foster in the 1993 Budget Act. Second, bidding credits ignore the strategic value that large communications players place on PCS licenses. Large communications entities can leverage their existing wireline network to place bids for PCS licenses that are significantly higher than the bids designated entities could place. Finally, designated entities endure a higher cost of capital due to their smaller asset base, start-up nature in providing communications services or rural service area. Thus, the fit between bidding credits and disseminating licenses to a wide variety of applicants and promoting economic opportunity is not as strong as the fit with the use of set-asides.

The last part of the second prong is whether a set-aside impermissibly deprives non-minority businesses access to at least

some of the spectrum under auction. As originally proposed, the Commission set aside Blocks C and D, or 19 percent of the PCS spectrum, for designated entities. Congress, however, has minimized the burden that non-minority firms will bear because it has defined the class of designated entities broadly to include, in addition to businesses owned by minorities and women, rural telephone companies and small business, regardless of race or gender. Non-minority firms may be eligible for 81 percent of the PCS spectrum and if these non-minority firms are small or rural telephone companies, they may be eligible for 100 percent of the PCS spectrum. Thus, the burden the innocent parties (i.e., non-designated entity firms) will have to shoulder due to the preferences for designated entities is minimal, if barely existent, and is therefore permissible. Franks v. Bowman Transportation Co., 96 S.Ct. 1251, 1270 (1976); United Jewish Organizations of Williamsburgh, Inc. v. Carey, 97 S.Ct. 996 (1977).

The FCC may also adopt administrative positions so that its preferences are not over- or under-inclusive to nullify the effectiveness of the remedy. For example, the Commission may decide that its preferences are not available to publicly traded corporations that may have over a fifty percent designated entity ownership to safeguard against over-inclusiveness and dilution of the effectiveness of its remedies. See, Third Report and Order, PP Docket No. 93-253 at ¶ 80. (released May 10, 1994).

III. Conclusion

Independent of which preference the Commission adopts to ensure designated entity participation in broadband PCS, both set-asides and bidding credits will be analyzed under the same constitutional standard. Both preference pass constitutional muster under the rational basis and intermediate scrutiny tests. If a strict scrutiny test is used, set-asides for designated entity are, for constitutional purposes, at least as good, if not better than bidding credits. For this reason, set-asides are preferable to bidding credits because set-asides guarantee that designated entities will become broadband PCS licensees.

Respectfully submitted,

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May 31, 1994

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, hereby certify that on this 31st day of May, 1994, a copy of the foregoing "Ex Parte Comments of the PCS Licensing Equity Alliance" was served by first class United States mail, postage prepaid on the following parties:

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